S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 10, 2006
v	No. 262922 Wayne Circuit Court
MATTHEW STEVEN DITZHAZY, Defendant-Appellee.	LC No. 05-002590

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

The prosecution appeals by leave granted from the trial court order granting defendant's motion to suppress a statement he made while in police custody. Because police did not violate defendant's Fifth Amendment rights, and because the totality of the circumstances do not support a finding that defendant's waiver of his rights was involuntary, the trial court's decision to suppress the statement was clearly erroneous, and, we reverse.

In January 2005, defendant lived with his girlfriend, Connie Nelson, and her nineteen-month-old son, James. In the early morning of January 28, Connie found James lying dead in his bed, tightly wrapped from head to foot in four layers of blankets and covered by a fitted sheet. In the course of investigating the death, police officers asked defendant to accompany them to the station and make a written statement. Once there, defendant wrote out a statement and spoke to Detective William Sant'Angelo. At 9:28 a.m., after defendant said, "OK, do you want me to tell you the truth now?" the detective advised defendant of his *Miranda*[1] rights. Defendant then gave an oral statement wherein he admitted to wrapping the child in blankets after becoming frustrated with his behavior. Shortly thereafter, defendant's attorney arrived, consulted with defendant, and got Sant'Angelo to agree not to further interrogate defendant outside of counsel's presence. Despite this agreement, the detective questioned defendant following the child's autopsy on January 29 without notifying counsel. After again advising defendant of his *Miranda* rights, Sant'Angelo told defendant that the autopsy revealed bruises on the child's nose, chin, and cheek. The detective then stated that the police could get fingerprints off of body parts just like on television shows about forensic science and asked defendant whether they would find his

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

fingerprints on the child's nose. Defendant responded by stating he had been playing "I got your nose" with the child. When Sant'Angelo asked defendant if he ever let go of the child's nose, defendant terminated the interview.

Defendant moved to suppress the written and oral statements he made on January 28 and the oral statement he made on January 29. The trial court found the first two statements admissible, but granted defendant's motion regarding the third, holding:

> But the third statement, in considering the totality of the circumstances, and a minor factor being that the officer in charge, by the statement on the record, had agreed not to interrogate the defendant. In addition to that, by that time, some time had passed with the defendant in custody. The officer was well aware of the defendant's limitations, mental limitations.
>
> He initiated the questioning, based on his additional information, based on the autopsy report, and based on a request from the prosecutor. And in initiating that conversation with defendant, he did make statements to the defendant that considering the totality of the circumstances, and the time that the defendant was in custody, the capabilities of this particular defendant, and the particular situation, making statements about fingerprints on the deceased child's nose, would be actions based on the totality of the circumstances that the court would want to dissuade the police from taking – in this particular circumstance.
>
> For that reason, that statement will be suppressed, and the court is, of course, not suppressing it for cross-examination, that is just for the case in chief.

On appeal, the prosecution asserts that the trial court erred in suppressing the January 29 statement because defendant voluntarily, knowingly, and intelligently waived his rights under the Fifth Amendment. In suppressing the January 29 statement, the trial court found that the police failed to secure a valid waiver of defendant's *Miranda* rights. In deciding whether a criminal defendant has made a valid waiver of these rights, a court must determine (1) whether the waiver was voluntary, and (2) whether the waiver was knowing and intelligent. *People v Daoud*, 462 Mich 621, 635-636; 614 NW2d 152 (2000).

We review a trial court's findings of fact on a motion to suppress evidence because it was obtained in violation of the defendant's right to counsel for clear error. *People v Harrington*, 258 Mich App 703, 705-706; 672 NW2d 344 (2003), citing *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001). "A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made." *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996). But our review is de novo to the extent that the trial court's ruling "involves an interpretation of the law or the application of a constitutional standard to uncontested facts." *Harrington*, *supra*, 706, quoting *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

Whether a waiver is voluntarily involves the same inquiry as whether a confession is voluntary under the Fourteenth Amendment. *Daoud*, *supra*, 635. Thus, a defendant's relinquishment of his *Miranda* rights is voluntary if "it was the product of a free and deliberate

choice rather than intimidation, coercion or deception." *Id.*, quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986), quoting *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986). In deciding whether a confession is voluntary, a trial court must determine, based on the totality of the circumstances, whether it is "'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired.'" *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). See also *People v Manning*, 243 Mich App 615, 635; 624 NW2d 746 (2000). In *Cipriano*, *supra*, 334, our Supreme Court set forth the following nonexclusive list of factors to consider when making such a determination:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

In contrast to the voluntariness analysis, the determination as to whether a suspect's waiver was knowing and intelligent "requires an inquiry into the suspect's level of understanding, irrespective of police behavior." *Daoud*, *supra*, 636. To knowingly waive his *Miranda* rights, a suspect need not understand all of the consequences of his choice. *Id.* Rather,

> [t]o establish a valid waiver, the state must present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him. [*Id.*, 637, quoting *People v Cheatham*, 453 Mich 1, 29; 551 NW2d 355 (1996).]

Although not clearly stated in the record, the trial court appears to have suppressed defendant's statement on the ground that he did not voluntarily waive his *Miranda* rights. The trial court expressed concern over whether the statement was voluntary and cited several of the factors from *Cipriano*, specifically defendant's intelligence and the length of time he was in custody, when making its decision. Further, the trial court stated that it wished to dissuade officers from using the sort of interrogation methods they employed with defendant. Because the "knowing and intelligent" prong of the analysis concerns a defendant's subjective level of understanding irrespective of police behavior, *Daoud*, *supra*, 636, the trial court must have based its decision on the voluntariness prong.

In determining that defendant's waiver was involuntary based on the totality of the circumstances, the trial court relied on four factors. These were: (1) the fact that the officer in charge broke his agreement with defense counsel not to interrogate defendant without his attorney present, (2) the length of time defendant had been in custody at the time of his statement, (3) that the officers knew of defendant's mental limitations, and (4) that the detective

made a statement to defendant regarding the possibility of finding his fingerprints on the child's nose. None of these factors standing alone or considered together provides a sufficient basis for finding that defendant did not voluntarily waive his rights.

The agreement between defense counsel and Sant'Angelo has no bearing on the voluntariness of defendant's waiver. Although defendant had an opportunity to consult with his attorney before making the January 29 statement, he did not invoke his right to counsel. Rather, his attorney merely told Sant'Angelo that he did not want defendant subjected to further interrogation. Even though the detective agreed and then reneged, there is nothing to suggest that the breaking of this agreement somehow impaired defendant's capacity for self-determination or induced him to waive his rights.

The Michigan Supreme Court has indicated that the related right to counsel must be invoked by a defendant in person rather than by his attorney. In discussing whether a defendant has waived appellate review of an issue, the Court stated:

> While the defendant must personally make an informed waiver for certain fundamental rights such as the right to counsel or the right to plead not guilty, for other rights, waiver may be effected by action of counsel. [*People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000), quoting *New York v Hill*, 528 US 110, 120; S Ct 797; 145 L Ed 2d 560 (2000).]

Waiver constitutes the "intentional relinquishment or abandonment of a known right." *Id.*, 215. And if attorneys lack the power to relinquish a fundamental right on behalf of their clients, it would seem that they are also without power to invoke that right.

Further, the length of time defendant was in custody before making his statement does not render his waiver involuntary. The district court judge presiding over defendant's preliminary examination found that defendant was not in custody before Sant'Angelo advised him of his rights at 9:28 a.m. on January 28. And the medical examiner finished the child's autopsy between 9:00 and 10:00 a.m. on January 29. Because the detective began questioning him shortly after the autopsy, defendant was in custody for just over twenty-four hours when he made the statement in question. Defendant had the opportunity to consult with his attorney during this period and the evidence does not suggest that he was in any way mistreated.

The fact that both defense counsel and defendant's father told Sant'Angelo about defendant's learning disability before he made the January 29th statement also fails to provide sufficient grounds for finding that defendant did not voluntarily waive his rights. Defendant's father testified that defendant suffers from a learning disability and has difficulty reading and writing. But he acknowledged that defendant finished high school and attended two years each of college and carpentry school. Even if defendant is of low intelligence, the record does not indicate that investigators took advantage of him. In *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), this Court found that although the defendant may have been of less-than-average intelligence, the record did not suggest that he did not understand his *Miranda* rights or that the police took advantage of his intelligence level. *Id.* In finding the defendant's statements voluntary, this Court held that "a deficiency in the defendant that is not exploited by the police cannot annul the voluntariness of a confession unless there is evidence of police coercion." *Id.*,

citing *Connelly*, *supra*, 164-165. Because Sant'Angelo did not use defendant's learning disability to force defendant to give up his rights, the detective's mere knowledge of the disability has no effect on the voluntariness of defendant's waiver.

Similarly, the fact that Sant'Angelo may have misled defendant regarding whether his fingerprints could be found on the child's nose does not provide sufficient grounds for finding defendant's statement was involuntary. In *People v Givans*, 227 Mich App 113, 122-123; 575 NW2d 84 (1997), the defendant confessed to assault with intent to rob while armed after police gave him the impression that his fingerprints had been found at the scene of the crime. "The detectives did not actually state that defendant's fingerprints had been found; they merely asked defendant 'how it would be possible that his prints, his fingerprints would be on the cash register.'" *Id.*, 123. This Court found that the detectives' action, while a consideration to be weighed with all other aspects of the interrogation, did not in itself render defendant's confession involuntary. Standing alone, Sant'Angelo's subterfuge concerning fingerprints, like that of the investigators in *Givans*, does not render defendant's waiver involuntary. And, in fact, after Sant'Angelo asked what appears to be a sarcastic follow-up question during this exchange, defendant terminated the interview. Defendant's behavior is evidence of his understanding of his rights.

Individually, each of the grounds cited by the trial court are insufficient to support a finding that defendant did not voluntarily waive his rights under the Fifth Amendment. And when examined together, these factors do not appear to have critically impaired defendant's capacity for self-determination. Based on the totality of the circumstances, we are left with a definite and firm conviction that a mistake has been made. Consequently, the trial court clearly erred in finding that defendant did not voluntarily waive his *Miranda* rights and we reverse its decision to suppress the January 29 statement.

Further, the conclusion that the trial court committed clear error is reinforced by the fact that its ruling contradicts itself. It is well established that a defendant's involuntary statements "may not be used for any purpose at trial, either for substantive evidence or for impeachment purposes." *People v Tyson*, 423 Mich 357, 377; 377 NW2d 738 (1985), citing *People v Reed*, 393 Mich 342; 224 NW2d 867 (1975). But prosecutors may use voluntary statements taken in violation of *Miranda* for impeachment purposes. *People v Stacy*, 193 Mich App 19, 24-25; 484 NW2d 675 (1992). Here, despite suppressing defendant's statement as the result of an involuntary waiver of his *Miranda* rights, the trial court held that the prosecution could use the statement to impeach defendant on cross-examination.

Reversed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio